

I. INTRODUCTION

This is the Third Quarterly Report produced by the Office of the Independent Police Auditor pursuant to the requirements of the San Jose Municipal Code Section 2.06.020c. This ordinance requires that the Auditor's reports include:

- A. A statistical analysis documenting the number of complaints by category, the number of complaints sustained and the actions taken;
- B. An analysis of trends and patterns; and
- C. Specific recommendations for change.

This report includes third quarter statistics under both the new and old classification systems and the results of the audit conducted using the new classification system. There also will be observations of the San Jose Police Department and the Internal Affairs Unit regarding the following issues:

- A. The length of time required to complete investigations;
- B. The need for an observation policy; and
- C. The Drunk-in-Public arrests.

To increase the overall effectiveness of the Office of the Independent Police Auditor, the following issues concerning the operations of this office shall be addressed:

- A. Publish biannual instead of quarterly reports.
- B. Obtain samples of statistical reports that address crime trends, which are already generated by various units of the police department and that are relevant to the

functions of this office.

- C. Seek funding to acquire a database and equipment to assist the Police Auditor in validating issues in the public reports. Also, seek additional funding for the printing and distribution of the Office of the Independent Police Auditor's trilingual brochure.
- D. Address issues related to the Procedures and Policies of the Independent Police Auditor's Office to wit:
 - 1. Set a time by which the Independent Police Auditor policies and procedures will be final.
 - 2. Allow the Auditor to give suggestions before the final draft of the procedures is adopted.
 - 3. Clarify the jurisdiction of the Office of the Independent Police Auditor concerning complaints from police department employees.
 - 4. Establish the Auditor's role in auditing Department Initiated Complaints.
 - 5. Determine the right to confidential information involving criminal records, juvenile and sexual assault cases.

II. STATISTICAL DATA

A. METHODOLOGY

The statistical data reflected in this report will cover the time period from April 1, 1994, to June 30, 1994. This statistical data is gathered from two sources: (a) the information that is collected in this office, and (b) the information received from Internal Affairs.

On June 15, 1994, Internal Affairs fully implemented the new system for classifying complaints. This will have a direct impact on how statistics are gathered and will naturally differ from the previous two quarters. The statistics in this report will not be compatible for comparison with the previous two quarters because this quarter covers part of the old method and part of the new method of classifying complaints. It will take at a minimum one more quarter before the old system is phased out. Formal Complaints will continue to be reported by the number of cases filed and by the number of allegations. Informal, Procedural and Policy Complaints will be reported by the number of cases only.

B. THIRD QUARTER STATISTICS

Under the new system, complaints are filed in one of four categories of complaints: Formal¹, Informal, Procedural and Policy. There were a total of 38 cases received in this quarter that are in progress and are awaiting classification by Internal Affairs. Therefore, the total number in each of the four categories is subject to change subsequent to their classification. The total number of Formal Complaints (88) included those complaints filed by citizens and those initiated by the Office of the Chief. Furthermore, the total number of Formal Complaints included those cases that were filed prior to the inception of this office but which were closed and received during this quarter. The Auditor's office audited and compiled the following statistics:

¹ See Appendix 1: Chart of Total Formal Misconduct Cases.

1. The total number of complaints submitted for review was 246.²
 - a. Formal Complaints: 88

Citizen Initiated (CI)	49
Department Initiated (DI)	14
Closed Citizen Initiated	20
Closed Department Initiated	5
 - b. Informal Complaints: 48
 - c. Procedural Complaints: 72
 - d. Policy Complaints: 0
 - e. In-Progress Complaints: 38
2. Formal Complaints will continue to be reported by the total number of cases filed in each reported period. They will be separated in two categories, Citizen Initiated Complaints and Department Initiated Complaints. Department Initiated Complaints are complaints, which are referred to Internal Affairs by the Office of the Chief, are Formal Complaints only. These cases will be broken down by the different types of allegations.
3. A total of 48 Informal Complaints was audited. The Auditor's office was able to contact 29 complainants to survey and verify the contents of their complaints. The following issues were covered in these audits and surveys:
 - a. Were the allegations recorded by Internal Affairs compatible with the complainant's account of the complaint?
 - b. Was the complainant informed by Internal Affairs about the two processes of complaints, Formal and Informal, to enable the complainant to make an informed choice?

2 See Appendix 2: Chart of Total Cases Audited.

- c. Did the complainant, by his/her own volition, request that the complaint be handled informally?
 - d. Was the complainant informed that if requested he/she can be contacted by the subject officer's supervisor?
 - e. If such a request was made, did the supervisor follow through with contacting the complainant?
 - f. Finally, did the allegations handle informally involve only minor transgressions?
- 4. A total of 72 Procedural Complaints were audited and 43 complainants were contacted and surveyed to ensure that:
 - a. the allegations recorded by Internal Affairs were compatible with the complainant's account of the nature of the complaint;
 - b. there was no factual basis to support a misconduct allegation;
 - c. the subject officer acted within Department policy; and
 - d. the dispute of fact cases, where there was another judicial entity available to process the concerns of the complaint, didn't include cases that should have been classified as misconduct complaints.
- 5. There was no Policy Complaint submitted for auditing this quarter. These Policy Complaints will also be subjected to random surveys to check for the following criterion:
 - a. Did the complaint pertain to an established policy?
 - b. Was this policy properly employed by the subject officer?
 - c. Was the complaint about policy and not about how the subject officer deployed that policy?

C. CITIZEN INITIATED FORMAL COMPLAINTS

There were 69 Citizen Initiated Formal Complaints that were received for audit this quarter. These complaints produced a total of 184 allegations. There is a total of 126 allegations that are still pending and only five allegations that were sustained. Our office tracks the number of sustained allegations and not cases because we don't use the prevailing case classification. The prevailing case method of classification designates the allegations a prevailing number and the most serious allegation will determine how the complaint will be classified. The following is the breakdown of these 184 allegations and are listed according to Internal Affairs prevailing case classification:

1.	UNNECESSARY FORCE: ³	<u>82</u>
	Sustained: ⁴	0
	Not Sustained:	3
	Unfounded:	10
	Exonerated:	14
	Pending:	55
2.	DISCRIMINATION/HARASSMENT:	<u>4</u>
	Sustained:	0
	Not Sustained:	1
	Pending:	3
3.	UNLAWFUL ARREST:	<u>11</u>
	Sustained:	0
	Exonerated:	4
	Pending:	7
4.	UNLAWFUL SEARCH:	<u>13</u>
	Sustained:	0
	Unfounded:	1
	Pending:	12

³ See Appendix 3: Misconduct Allegations.

⁴ See Appendix 4: Definitions of Findings.

5.	RUDE CONDUCT:	<u>29</u>
	Sustained:	0
	Not Sustained:	6
	Unfounded:	2
	Exonerated:	2
	Pending:	19
6.	UNOFFICERLIKE CONDUCT:	<u>5</u>
	Sustained:	1
	<u>Discipline imposed:</u> Letter of reprimand	
	Not Sustained:	1
	Unfounded:	1
	Pending:	2
7.	EXCESSIVE POLICE SERVICE:	<u>2</u>
	Sustained:	0
	Unfounded:	1
	Pending:	1
8.	IMPROPER PROCEDURE:	<u>26</u>
	Sustained:	3
	<u>Type of discipline imposed:</u>	
	Letter of Reprimand:	1
	Training and Counseling:	1
	Officer resigned before discipline imposed:	1
	Not Sustained:	1
	Unfounded:	4
	Pending:	18
9.	MISSING/DAMAGED PROPERTY:	<u>9</u>
	Sustained:	1
	<u>Type of discipline imposed:</u> Training and counseling	
	No Finding:	1
	Pending:	7
10.	FAILURE TO TAKE ACTION:	<u>3</u>
	Unfounded:	1
	Pending:	2

11. DELAY IN RESPONSE: 0

D. DEPARTMENT INITIATED FORMAL COMPLAINTS

There were 19 Department Initiated Formal Complaints that were received for this quarter. These complaints produced a total of 29 allegations. There is a total of nine allegations that are still pending and only seven allegations were sustained. The audit of these Department Initiated Complaints is limited to a review of the information contained on the face sheets. The content of this type of complaint is not audited; therefore, the information on these complaints does not provide a basis for any trends or patterns and are included only for their numerical value.

1.	UNNECESSARY FORCE	<u>1</u>
	Exonerated: 1	
2.	UNLAWFUL ARREST:	<u>1</u>
	Exonerated: 1	
3.	UNOFFICERLIKE CONDUCT:	<u>9</u>
	Not Sustained: 1	
	Unfounded: 5	
	Pending: 3	
4.	IMPROPER PROCEDURE:	<u>18</u>
	Sustained: 7	
	<u>Type of discipline imposed:</u>	
	Demotion	1
	10-hr suspension	1
	Letter of Reprimand:	1
	Documented oral counseling:	4
	Not Sustained: 2	
	Exonerated: 3	
	Pending: 6	

III. AUDIT OF INFORMAL COMPLAINTS

The informal handling of a complaint is a part of the new system established to investigate a complaint.

Informal Complaints are those complaints involving allegations of minor transgressions on the part of a subject officer⁵ which may be handled informally by bringing the matter to the attention of the subject officer's chain of command at the complainant's request.⁶ These are typically Rude Conduct complaints. The complainant has the ultimate control whether to treat the complaint as Formal or Informal.

Even though the allegations are not proven, and thus no discipline is imposed, the complaint is still tracked in the same manner as Formal Complaints.

There was a total of 48 Informal Complaints audited this quarter. These audits were followed up with a survey of the complainants. The survey consisted of asking the complainant a set of pre-designated questions. Even though the interviewer followed a standard script and questionnaire, it should be noted that it is still possible that the nature of the question, the voice intonation or other unknown factor could influence the response.

In 19 of the cases the complainants were unavailable for various reasons. In eight of those 19 unavailable complaints, the phone calls were not returned. In six of those cases the phone number was disconnected. In five cases, the complainants were either incarcerated, did not wish to speak to us, or stated other miscellaneous reasons.

⁵ Subject officer refers to the officer of whom the complaint is about.

⁶ Response to Independent Police Auditor's First Quarterly Report, San Jose Police Department, page 7, May 25, 1994.

The 29 remaining Informal Complaints were audited by a standardized list of questions. The first question was to have the complainant describe the nature of the complaint. This was asked to compare the allegation as stated in the file to what was said by the complainant. There were only three of those 29 complaints where the file was slightly different from what the complainants alleged. The other 26 complaints were compatible with Internal Affairs files.

The second question asked was if the complainant was informed of the formal and informal handling of the complaint. The purpose for asking this was to determine if in fact the complainant was informed of the two different manners in which their misconduct complaints can be handled. In ten of the 29 complaints, the citizens responded that they were not informed about the different manner in which to handle the complaints. In one complaint, the person could not remember if they in fact had been informed and in another, they were only informed of the informal handling of a complaint. In 17 cases, the complainants were informed of the two processes.

The third question was if it was the complainant's choice to have the complaint handled informally. The complainant has the ultimate control to treat the complaint formally or informally. By having this question answered, it can be determined if in fact the complainant knew about the informal handling of the complaint and made an informed decision to have the complaint handled in this manner. An explanation is then requested if the person answered in the negative. In 22 cases, the citizens requested an informal handling of the complaint. In six of the complaints, the citizens stated that they were not informed of the option and thus did not choose it. In only one case, the complainant did not choose the informal handling of the complaint. The numbers are not the same as with question number two, because even though citizens were not informed of the process they preferred to handle the situation informally and thus requested it.

The next question was if the complainant requested to be contacted by the subject

officer's supervisor. This question was asked to determine if the complainant knew that he or she could be contacted by an officer's supervisor. In six of the complaints, the citizen did not know of the option to have a supervisor contact them. In three of the complaints, the complainants did not want to be contacted by a supervisor. In 19 cases, the citizens requested to be contacted.

A follow-up question was if they requested contact by a supervisor did the supervisor in fact contact them. It was important to know if the supervisor had followed through and had spoken with the complainant. Of those 19 complaints where the citizens requested contact by a supervisor, only four people responded that they were not contacted and one person could not remember.

If the complainants stated that they did not know that they could request a supervisor, they then were asked if known, would they have requested contact by the supervisor. This was asked in order to know that if this knowledge had been available, would the complainant have requested supervisory contact. Of the seven people who did not know that they could be contacted by a supervisor, five responded that they would have liked to be contacted.

The next question dealt with the contact the citizen had with Internal Affairs. The complainants were asked if Internal Affairs was helpful, informative, or other. The complainants were asked this question because some citizens have complained about their contact with Internal Affairs. Ten people responded that Internal Affairs was helpful and two said that their contact with that unit was informative. Seventeen respondents' answer ranged from Internal Affairs did not care about the complaint to the Sergeant with whom they spoke was "impressive" and "professional."

The next question dealt with the level of satisfaction with the handling of their complaint. The levels of satisfaction were very satisfied, satisfied and dissatisfied. The purpose of this

office is to audit the new system of investigating complaints. By knowing the level of satisfaction, this office can determine the effectiveness of the new system. In seven of the cases, the complainants were very satisfied. In eleven cases, the citizens were satisfied. In eight cases, the complaining parties were dissatisfied. Finally in three cases, the complainant did not state a level of satisfaction. It is unknown if the complainants' dissatisfaction is attributed to their interaction with Internal Affairs or with the finding of their complaint.

Finally, the complainant was asked if he/she knew about the Independent Police Auditor as an alternative to filing a complaint. In 21 cases, the citizen was not aware of the existence of our office.

IV. AUDIT OF PROCEDURAL COMPLAINTS

Procedural Complaints are defined in two separate portions. The first portion includes the following: “After the initial investigation by the Intake Officer, the Department determines if the subject officer acted reasonably and within Department policy and procedure given the specific circumstances and facts of the incident and that despite the allegation of misconduct, there is no factual basis to support the allegation.” At the end of the investigation, the assigned finding will be “Within Department Policy.”⁷

A second portion of the definition includes: “The allegation is a dispute of fact case wherein there is no independent information, evidence or witnesses available to support the complaint and there exists another judicial entity which is available to process the concerns of the complainant.” A finding of “No Misconduct Determined” will be assigned to the dispute of fact cases.⁸

For example, a person files a complaint alleging an Unlawful Search, where the complainant stated that the police entered his/her home and conducted a search. After a preliminary investigation, the Internal Affairs investigator discovers that the complainant is on parole and has a search clause. The case will be closed with a finding of “No Misconduct Determined.” There was a total of 72 Procedural Complaints. Eleven of those complainants were not surveyed because they were cases that were filed in this office. Therefore, the total number of cases surveyed was 61. Of those 61 cases, 18 complainants were unavailable. Thus, 43 persons were actually contacted.

The 43 Procedural Complaints, like Informal Complaints, were audited by a standardized

⁷ Ibid., page 6.

⁸ Ibid., page 6.

list of questions and a script strictly adhered to. The first question was to have the complainant describe the nature of the complaint. This was asked to compare the allegation as stated by Internal Affairs to what was said by the complainant. From the description by the complainant and Internal Affairs' files, it is possible to compare if the cases were properly classified. In 29 of the cases, the allegations were compatible. In thirteen of the cases, the allegations were partially compatible. Only in one case was the allegation not compatible with what the complainant stated to the Auditor's office.

The second question dealt with their contact with Internal Affairs. The complainants were asked if Internal Affairs was helpful, informative, or other. The complainants were asked this because some citizens have complained about their contact with Internal Affairs. In 16 cases, the respondents stated that Internal Affairs was helpful. In one case, the citizen responded that Internal Affairs was informative. In 26 cases, the answer to this question ranged from Internal Affairs being very pleasant, receptive or fine to unsympathetic, not helpful or upsetting.

The third question dealt with the level of satisfaction with the handling of their complaint. The level of satisfaction can help to determine the impression left after a complaint is filed and the effectiveness of the investigative system. In two cases, the respondents were very satisfied. In 21 complaints, the complainants were satisfied. In 15 cases, the complainants were dissatisfied with the handling of their complaints. In five cases, the complainants did not state a level of satisfaction. It is unknown if the dissatisfaction was attributed to their interaction with Internal Affairs or with the finding of their complaints.

Finally, the complainant was asked if he/she knew about the Independent Police Auditor as an alternative forum to file a complaint. Eight people recognized our office. In 35 cases, the response was that they had not heard about the Auditor's office.

V. ISSUES & RECOMMENDATIONS

- A. THE INTERNAL AFFAIRS UNIT SHOULD COMPLY WITH A TIMETABLE REGARDING THE LENGTH OF TIME REQUIRED FOR AN INVESTIGATION TO BE COMPLETED.

Auditing Process: A study of the Citizen Initiated Formal Misconduct Complaints submitted for review between September 1993 and June 1994 revealed that out of 117 cases completed, 28 of those cases or approximately 25% have taken longer than a year to complete. Currently, there are over 157 Citizen Initiated Formal Complaints that are pending. This number does not include the 38 cases that are in progress awaiting to be classified, the 23 Department Initiated Complaints, Procedural or Informal Complaints. Of those pending 157 complaints, 66 cases have been opened for six months to two years. The remaining pending cases have been opened from the time they were initiated up to five months.

One reason why Formal Complaints remain open for a longer period of time is because more investigation is required for these cases than others. Other delays include issues such as the officers involved are unknown, the date and time of the incident can't be specified, or the high number of witnesses, officers and complainants involved. Internal Affairs has also had an increase in cases and other related work as a result of the Independent Police Auditor's Office. All this may attribute to the delays.

The Program Management Report submitted by Internal Affairs calls for the completion of 75% of the cases within 120 days.

This guideline has not been met. There were complaints where some of the parties were not identified or the cases classified until six months after the complaints were received. Although not all cases take this amount of time, some cases do take months to be classified, even

though preliminary investigation is ongoing in these cases. At the end of this third quarter, there were 38 In-Progress cases awaiting classification. Some of these cases dated back to the beginning of February 1994. The majority of these In-Progress cases are Procedural and Informal Complaints.

Another reason that the cases may not be completed in a timely fashion is due to the seriousness of the allegation and the number of people involved with the complaint. When the allegations are more serious such as Unnecessary Force with multiple complainants and officers, these complaints will take longer to investigate instead of a complaint which contains a single allegation of rude conduct with one officer and one complainant.

In at least one case which had only one complainant, one subject officer, one or two witnesses and an allegation of rude conduct, the complaint took 554 days to complete an investigation. On another similar case it took 290 days to complete. These two cases were filed in 1992 and the first case was closed in 1994 and the latter case was closed in 1993.

Currently, there are over 23 Formal Complaints, which are at a minimum three months old if not longer. Those complaints involve one or two officers, one or two complainants, and one or two allegations, and are not Unnecessary Force Complaints.

Several problems arise when Internal Affairs requires a prolonged period of time to complete an investigation: memories wane, witnesses disappear, and the issues lose their urgency to the extent that some complainants do not want to pursue the matter any longer.

For example, in at least one case the complainant was not interviewed until five months after the initial contact. The civilian witnesses were not interviewed until one year and three months later. In other cases where Internal Affairs did not contact the people involved for a long

period of time, they discovered that the complainants had moved and their whereabouts were unknown. Without further information the complaints were difficult, if not impossible, to investigate and were thus closed with a “No Finding.”⁹

If the investigations are not conducted within a certain time frame, the probability increases that people will forget. Unless the complainant maintains meticulous notes about the event, the complainant will find it difficult to remember simple details such as the name of the officer or the sequence of events. The impression that is then given to an investigator is that the complainant is not being truthful or that the matter is not serious because simple details are forgotten.

The same problem exists for civilian witnesses in a complaint. Unlike officers who are trained to write and maintain notes or police reports and have developed observation skills, witnesses find it very difficult to remember the details and the facts that may be determinative to the outcome of an investigation. Internal Affairs investigators frequently rely and refer to inconsistencies between the complainant’s statement and other witness’ statement. Consistency is critical in determining issues such as credibility and reliability. Uninterested witnesses are very important to the case under investigation because their objective view carries great weight and it helps the investigator to reach a finding. The details may not be remembered if the witnesses are not interviewed within a reasonable time.

Although officers are better equipped to remember details because of their training, they are also challenged when the subject officer is interviewed a year later. The subject officer is usually not interviewed until the investigation is near to completion. It is common for officers to frequently respond with an “I don’t recall” answer to important issues. This places the officer in a negative light because his lack of recollection could be interpreted as being evasive, untruthful

⁹ See Appendix 4: Definition of Findings.

or incompetent. Although officers are trained and experienced in conducting interviews and are subjected to detailed cross-examination in court, they may find it difficult to remember the occurrence after one year.

Finally, the importance of completing these investigations in a timely manner is simply for credibility reasons. When Internal Affairs does not complete the investigation or interviews the witnesses within a few months, the impression left to the complainants is that the San Jose Police Department is trying to hide the complaint or letting the issue become stale so the complaint will lose its urgency.

This impression not only hurts Internal Affairs but this office as well. Complainants often express a feeling that since the investigation is conducted by police officers that the complaint will not be handled objectively, thoroughly and/or taken seriously. The level of frustration is further raised when a complainant waits an extensive time for the investigation to be completed and then the complainant receives a letter stating that the allegation was not sustained. At this point the complainant contacts our office for further review. The Auditor will now take some more time to look into this specific case, adding to the waiting period. The complainant is further dissatisfied when after the long wait, the Auditor informs him/her that she concurred with the finding of the allegation. Though the outcome of the audit is separate from the time issue, the complainant's dissatisfaction escalates when combined with an extended wait. This office is then subjected to a loss of credibility and trusts from those complainants who contacted the Auditor.

Recommendation: To alleviate these time problems, Internal Affairs should complete an investigation in a timely manner. A clear and consistent time limitation policy for the various cases should be created. Obviously, the more serious the allegation and the number of witnesses, complainants and officers involved, the more time will be required. A timetable should be created and with a projected date for full compliance for Formal, Informal, Procedural and Policy

Complaints. The following timetable for Formal Misconduct Complaints should be implemented:

30 days-	Classification of all cases
120 days-	Completion of 75% of cases
300 days-	Completion of 100% of cases

Deadlines that are unrealistic or habitually broken have little or no value in managing one's caseload.

It should be noted that Internal Affairs has only six sergeants handling all the investigations, including all the officer involved shootings. The criticism of the time required by Internal Affairs to complete the investigations should not be interpreted to imply that these investigators are not hard working or efficient. On the contrary, the Auditor's personal observations have been that every member of that unit displays a very dedicated and diligent work ethic.

The Internal Affairs Unit should establish a goal that barring extraordinary circumstances, all complainants and witnesses should be interviewed within three months after the initiation of a complaint. The time limitation regarding the subject officers is also necessary because although they have written documentation to refresh their recollection in the form of a police report, the details of the event may be lost or become vague. Witness officers are not always required to write a supplement report. Therefore, the lack of reports, notes or other means by which to remember combined with the high number of similar incidents will have a significant impact on the officer's recollection.

To facilitate and expedite the audits, Internal Affairs investigators should standardize the format used when writing the case summary of the investigation. The dates when the witnesses were interviewed should be clearly stated on the summary.

Another area of concern is the time that transpires from when the information is gathered to when the investigation is written. Often there is a lapse of months from the time Internal Affairs investigators conduct recorded interviews of the witnesses to the time that the witness' statement is written. The concern is that important detail may be left out due to loss of memory. Detail is important because after the case is investigated, it is written and if Internal Affairs decides that the case may be sustained, it is sent up the chain of command for a finding. The commanding staff should receive a complete and thorough case because they are charged with making the decision to sustain or not sustain the complaint.

On the other hand, if Internal Affairs investigators are thorough and pay attention to detail, they may have to reacquaint themselves with the case before writing the reports, thus duplicating their efforts.

Complaints should be classified within one month after they have been received because this would help the overall amount of time required to complete an investigation and the cases would not be in a holding pattern for very long.

The complainant should be contacted at regular intervals with updates or informed as to the status of the complaint. This should apply to all types of complaints, not just the Formal Misconduct Complaints. Since August of 1994, Internal Affairs has implemented a system whereby the complainants receive a notice within thirty days of the received complaint and then update every sixty days. The formal implementation of this procedure will adequately solve this problem.

By improving the amount of time Internal Affairs takes to complete an investigation and by keeping the complainant informed, the perception of Internal Affairs as an efficient and able unit equipped to handle all citizen complaints will be advanced. Public confidence is not

furthered by offering excuses of lack of person power.

The new classification system should also help in decreasing the amount of time required to complete an investigation. With the present informal system which reduces the number of formal investigations, Internal Affairs should see an improvement in closing complaints sooner and more efficiently.

Complaints that are sent to the Bureau of Field Operations (BFO) are consistently completed within the three-month time frame. However, BFO consist of over 90 sergeants that can investigate the referrals from Internal Affairs. Internal Affairs should increase the number of complaints routed to BFO as deemed appropriate by the Chief of Police. By sending more of the less serious complaints to BFO, Internal Affairs can have more time to complete the more serious cases in a timely manner.

Another benefit in having more minor cases go to BFO for investigation is that it will give the subject officers' supervisors an opportunity to monitor the officers' conduct more closely. This exposes the sergeants to the process of officer discipline, and will force the supervisors to keep current with the Department's standards and policies.

B. CITIZEN COMPLAINTS ALLEGE THAT THE POLICE DISSUADE WITNESSES FROM OBSERVING AND/OR RECORDING POLICE MISCONDUCT.

Auditing Process: During the nine months of the operations of this office, a difficult issue to validate has arisen. This issue deals with allegations that citizens are dissuaded from observing or recording police related incidents. These allegations prompted the Auditor to conduct a study of all Formal Complaints previously audited to determine the frequency of this type of complaint. An audit of 240 Formal Misconduct Complaints revealed that only four cases contained

information that this type of conduct was alleged and then only as a collateral issue. The audit was limited to the written documents contained in the files and did not extend to the hundreds of taped interviews associated with these files. However, this type of issue does not involve conduct for which the average citizen would normally file a complaint. This type of complaint arose at community gatherings where the Auditor was invited to speak.

The types of scenarios that were mostly related in the complaints and in the public meetings are as followed:

1. Police respond to a disturbance call and family members inside their homes are ordered to another room or to go outside while police arrest or detain a family member.
2. Witnesses come upon a scene where police are detaining or arresting a suspect, police order them to leave under the auspices that it is police business.
3. Neighbors go outside to look at what the police are doing and they are told by the police to reenter their homes.
4. Witness upon observing what is perceived as the police physically or verbally abusing someone produces a video or audio recorder and attempts to record the incident. The police threaten or actually proceed to confiscate the recording device.

The audit of the complaints did not numerically support the allegation that the police dissuade citizens from observing or recording police incidents. Nevertheless, the safeguarding of potential witnesses is such an important issue that steps should be taken to ensure their participation and availability.

Safety of the officers in situations where crowds may pose a threat is crucial in determining when a person should be ordered to disperse. However, it is also necessary to safeguard against a total ban which would have a “chilling effect” on the public’s right to observe and/or monitor police conduct.

The statements of neutral witnesses in a citizen complaint are vital and may even be the deciding factor of whether the complaint will be sustained or not. A lack of neutral witnesses may be attributed to the low sustained rate. Prior review of the Formal Misconduct Complaints have not produced evidence that statements from neutral witnesses were ignored.

The audit of the complaints has revealed that many of these cases end up in a stalemate; the complainant's word against the officers' without a neutral witness to break the tie. This is because most police contacts, which later lead to citizen complaints, happen in the privacy of one's home, car or in a manner which is not conducive to producing an over abundance of witnesses. Furthermore, citizens may be reluctant or even fearful to become witnesses in cases involving the internal investigation of police officers. More emphasis should be placed in methods of persuading citizens to get involved. Not only do neutral witnesses help to support a complainant's case but it also helps to corroborate the police officers' account of what happened, should the complainant be fabricating a false complaint.

The perception that the police department dissuades citizen involvement is detrimental to public confidence in the police. Furthermore, it perpetuates the believe that police officers engage in misconduct and then cover up their deeds by eliminating witnesses.

An inquiry with the Office of the Chief revealed that as of June 30, 1994 there was no order or policy addressing this issue. An order that had been issued on January of 1993, addressing this matter entitled "Rights of Onlookers at the Scene of an Incident" expired on January of 1994. Mr. John M. Crew, Director of the ACLU's Police Practice Project, provided the Auditor with a copy of the press release detailing the San Jose Police Department's expired order and a sample of the Rights of Onlookers used by the San Francisco Police Department for comparison.¹⁰ Subsequent to the end of the third quarter, the Auditor was informed that the San

¹⁰ See Appendix 5: Rights of Onlookers (San Jose and San Francisco Police Departments).

Jose Police Department is in the process of establishing an onlooker's policy.

Recommendation: The Chief of Police should adopt a policy detailing how police officers should handle situations involving observations and recordings by potential witnesses. This policy should create a balance between officer safety and the preservation of impartial witnesses and recorded evidence. The police department should inquire from neighboring cities about their policies regarding this matter and adopt of a similar policy. This policy should become part of the San Jose Police Department Duty Manual as soon as possible. This policy should not be so vague that implementation is left to the total discretion of the officer. The goal of this policy should be to encourage more citizen participation. In situations where the officer states that safety was a concern, the conduct should be measured by a reasonable officer standard. Prevention of abuse of police discretion should be emphasized in this policy.

C. ARE SAN JOSE POLICE OFFICERS MAKING *ATTITUDE ARRESTS* INVOLVING CHARGES OF PUBLIC INTOXICATION?

Attitude arrests are arrests which are known to occur when a person is arrested because the officer does not like the arrestee's attitude. Attitude arrests are deemed to be of individuals who may be perceived by the officers as uncooperative. The arrest focuses on the attitude of the person and at times the Drunk-in-Public Penal Code Section may be the vehicle by which officers accomplish the arrest.

Auditing Process: Between the period of September 1993 and June 1994, 240 Formal Complaints were reviewed concerning this issue. These cases dated from 1991 to 1994. In 23 of these complaints, the police reports or other supporting information in the files indicated that the complainants had been charged with public intoxication commonly known as Drunk-in-Public.

The Auditor examined these cases for any identifiable patterns. In most of the cases, the officers had been dispatched to the scene because of some type of disturbance ranging from domestic disputes, conflicts at bars or simply loud music. This review revealed that the typical conduct that led to a so called attitude arrest for Drunk-in-Public was as a result of a person questioning and/or confronting the officer, not cooperating or obeying the officer's commands. Three complaints involved the PASSENGERS in a car stop who were subsequently arrested for Drunk-in-Public.

There are certain factors that must be present in a Drunk-in-Public violation. To be considered Drunk-in-Public, the person arrested must be: (1) in a public place, (2) under the influence, and (3) in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others.

1. **Public Places:** The available information in the files, indicated that in ten of the 23 cases indicated the complainants were arrested for Drunk-in-Public after the officer responded to the complainant's home. In two of the cases, Drunk-in-Public was the only charge. These reports neither specify when the officers arrived at the home nor in what location the arrest took place. To be found in violation of Penal Code Section 647, subdivision f, the person must be in a public place. Case law has held that a public place may include the areas outside the home including the driveway, lawn or front porch. The police report did not identify the specific location of the arrest; therefore, the Auditor was not able to determine if the arrests took place inside or outside the home for purposes of establishing if the arrest occurred in a public place.
2. **Under The Influence:** An audit of these 23 complaints revealed that very little information is written in the police report substantiating why this person is considered to be under the influence. The police reports sometimes included symptoms such as an odor

of alcohol, slurred speech or bloodshot eyes but not necessarily all of these symptoms were reported in each case. Although these observations may indicate that a person has been drinking, they are not conclusive evidence that the person is under the influence of alcohol. These characteristics may be peculiar to that individual or they may be attributed to other reasons such as illness, injury or emotional condition.¹¹

The lack of documentation is not consistent with the San Jose Police Department Duty Manual. The duty manual states that certain objective signs of intoxication should be documented, such as the odor of alcohol on the person's breath, clothing, or inside the vehicle. Other factors such as speech abnormalities which include slurring, rambling or being incoherent should also be noted. Coordination problems such as staggering, fumbling or misjudging distances should be written. The manual specifically states that when a person will not or cannot answer questions accurately or perform physical tasks with normal ability, the officer observing such conduct will first determine if some illness, injury or emotional condition caused the abnormality or if induced by ingestion of an intoxicating substance. The determination shall also be included in the report.¹²

Unlike when a person is arrested for being under the influence of a drug or for drunk driving, a chemical test is not required to determine the presence of alcohol. There are three chemical tests that are routinely used by local police to detect the presence of a drug or alcohol. These are administered to test for driving under the influence and for being under the influence of drugs. The law does not require that these tests be administered to persons who are arrested for Drunk-in-Public.

The breath test requires that the person blow into an apparatus called an

¹¹ San Jose Police Department Duty Manual, Section L 2149.

¹² San Jose Police Department Duty Manual, Section L 2149.

intoxilizer. This intoxilizer has the capability of registering the alcohol level and is routinely used on suspected drunk drivers at the San Jose Police Department. Police officers are trained in the use of this equipment. The breath test is perhaps the least expensive test.

Another commonly used test is a blood test. This requires that the medical personnel draw blood from the person and then take the specimen to a lab for analysis. This is a very precise test and has the capability of quantifying the alcohol level. The third test is a urine sample test. This test requires a lab analysis similar to that of the blood test.

At this time, the San Jose Police Department is not required to make available any chemical test to a person suspected of being under the influence of alcohol subsequent to their arrest for Drunk-in-Public. While the chemical test is strong evidence that alcohol is or isn't present in the person's body, it is not conclusive whether the person is under the influence of alcohol because of the different alcohol tolerance levels that each person has.

Field Sobriety Tests is another routine test that is administered by police officers to suspected drunk drivers but which is seldom administered to persons suspected of Drunk-in-Public.

3. **Unable To Exercise Care:** Being under the influence must include evidence that the intoxicated person is not merely drunk for purposes of driving but instead the person must be so very drunk that he/she is unable to care for himself, herself or others.

The courts have held that when an officer arrests a person for being Drunk-in-Public, the officer must document the reasons why this person is considered to be under

the influence as well as how he or she is so inebriated that he or she is unable to care for himself or herself or others.

The 23 complaints researched by the Auditor contained some information that the complainant had been drinking; however, only two cases had an explanation or documentation to substantiate why the officer concluded that the person may be so inebriated that he/she was unable to care for himself/herself or others. It is not unusual for police reports not to document a less serious charge like Drunk-in-Public when a more serious charge is alleged. However, there were at least two other cases where Drunk-in-Public was the only charge and in other cases the more serious charge resulted from the Drunk-in-Public arrest.

An audit of these 23 cases did not provide sufficient evidence to conclude that officers made punitive arrests without legal justification by arresting the complainants for being drunk. In order to validate that allegation, the Auditor would have had to conduct interviews with the specific officers to obtain additional information that they may have but was not reduced to writing. In order to find that the officers arrested the complainants in these cases because of their attitude, the Auditor would have to speculate about their motives.

What the audit did reveal is that officers are failing to adequately document the required information in the police reports when making a Drunk-in-Public arrest. All ten cases, where the complainant was arrested for Drunk-in-Public in the area of his or her own home, did not indicate that the arrest took place in a public place. Without the benefit of a chemical test to prove that the person had consumed some alcohol, the only evidence was the officer's subjective observations that the complainant was drunk.

Lastly, all but two of the 23 cases were void of documentation stating why the officers

concluded that the complainants could not care for themselves or others.

Some of the reasons offered during interviews of the subject officers were that if not arrested the person might stumble onto traffic and cause someone to get hurt or they (the police) might have to come back. While the temptation may be for officers to take action in anticipation of future wrongdoing this type of action is unacceptable and illegal.

Very few of these cases are ever reviewed by the court. Generally, the person arrested is released after a period of time without the case ever going to the District Attorney for prosecution. Since there are no further proceedings, there is neither a means of appeal nor a routine review by the District Attorney to look into the propriety of the arrest. Even if the District Attorney decides to pursue the matter, the case is often dismissed in the interest of justice before there is a hearing to determine the validity of the arrest. This process may be adequate and appropriate to handle the majority of the cases; however, it also makes this type of arrest vulnerable to officers who arrest a citizen without legal justification. Of these 23 cases, 15 were charged, two were prosecuted and three are still pending.

Recommendations: The San Jose Police Department should provide additional training on the preparation of thorough and complete police reports. These reports should contain documentation of all the required elements necessary to substantiate a Drunk-in-Public arrest. The San Jose Police Department Duty Manual should be reviewed and, if necessary, updated to include any needed changes. First line supervisors should be responsible in ensuring that the police reports and/or booking sheets contain all the required information.

Even though training and experience may qualify an officer to make a determination of when a person is believed to be intoxicated in public, the basic information to satisfy the criminal

elements should be in writing.

Finally, chemical testing should be an option for any person requesting one in an arrest for Drunk-in-Public. Some Bay Area cities have such an option. San Francisco and Oakland make chemical testing available upon request at no expense to the City. This expense is incurred by the party requesting the test.¹³ San Jose Police Department should implement a similar order.

¹³ See Appendix 6: San Francisco Guidelines for Drunk in Public.

VI. PENDING ISSUES FROM SECOND QUARTER

A. HANDCUFFS

An issue that this office has monitored involves allegations that unnecessary injuries are allegedly inflicted while handcuffed. There were 23 complaints where the person arrested cited injuries inflicted by the manner in which he/she was handcuffed. When researching the issue, many aspects were looked at as alternatives in reducing injuries such as double-locking as the rule rather than the exception, a different style of handcuffs, and seats in patrol cars that would accommodate handcuffed individuals. At this time, this office is not prepared to make any recommendations and will defer to future reports to address this issue.

B. GANG STEREOTYPE

Some parents alleged that their youths were inappropriately stereotyped as gang members. There were only nine cases, which dealt with this issue. There were not enough complaints to produce a trend or pattern. Each complaint was a unique situation. This issue shall continue to be monitored.

C. ATTITUDE ARRESTS FOR BEING UNDER THE INFLUENCE OF DRUGS

There was a total of 27 complaints, where the citizen alleged that he/she was wrongfully charged with being under the influence of a drug or narcotic. The number and information in these complaints were not sufficient to draw any conclusions or any inferences at this time.

D. UNLAWFUL HOME ENTRIES UNDER THE GUISE OF “WELFARE CHECKS”

This issue has become moot because recent case law held that officers may enter the home to conduct welfare checks. The case limits the “check” to a cursory search of the premises to ascertain that the occupants are safe and well.

E. ATTITUDE ARRESTS FOR RESISTING/DELAYING/OBSTRUCTING AN OFFICER

Of the 240 Formal Misconduct Complaints audited, there was a total of 71 complaints where the citizens were arrested for resisting, delaying or obstructing an officer in the line of duty. The only correlation noted at this time is that unnecessary force allegations are linked with this type of arrest. This office is not prepared to make any determinations and will defer to future reports to address this issue. This issue shall continue to be monitored.

VII. NEEDS OF THE OFFICE OF THE INDEPENDENT POLICE AUDITOR

A. PREPARATION OF QUARTERLY REPORTS

Currently the Office of the Independent Police Auditor prepares public, quarterly reports in compliance with the City Ordinance. There are several problems that exist with this process. First, a quarter of a year does not provide sufficient data to validate certain issues that the complaints raise. Second, complaints are seldom completed within three months; therefore, the majority of the complaints reported will remain open for several more months. These open cases repeatedly appear as pending in the statistical charts. The patterns or trends reported cover more than just a quarter, making the assessment of that quarter not possible. Finally, these reports require an enormous amount of time and expense to compile, write and publish. This office is still without a database and the hand-searching of complaints is close to unmanageable.

After the upcoming annual report, which is expected to be published in November 1994, it is recommended that this office produce biannual reports.

B. FACILITATION OF POLICE GENERATED INFORMATION

The Auditor has on several occasions spent Office of the Independent Police Auditor staff and Police personnel time researching and gathering data that is already partially gathered and compiled in reports by the police department. It is difficult to request information that this office is not aware exist. For example, the Program Management Reports that the police department prepares are very useful in helping this office see statistics gathered by categories similar to those gathered by this office.

It is recommended that a sample of all reports produced by the police department be provided in order for this office to determine which would be helpful and/or applicable to the

functions of this office. Once those reports that are helpful are identified, this office should be included in the distribution list.

C. FUNDING FOR EQUIPMENT AND THE DEVELOPMENT OF A DATABASE AND FUNDS TO PUBLISH ADDITIONAL COPIES OF THE TRILINGUAL BROCHURE

This office in the last nine months has acquired 1034 cases. As time progresses more complaints will be accumulated and the likelihood that the information in its present state be adequately hand-searched for much longer is slim. Also, the longer it takes to develop the system to store and sort the information, the more time and expense it will require later. The Office of the Independent Police Auditor's staff is able to work with the current caseload but cannot also handle the backlog. A mandate of this office is to identify patterns and trends in police officers' behavior from the audited complaints. To maintain the credibility and integrity of this office, it is necessary to adequately validate all findings and recommendations made. The only manner to do this is to use the information contained in the complaints themselves. Another very important fact to remember is that the files must be returned to Internal Affairs within six months after the Auditor has reviewed the files, leaving this office without the information it must have to perform its functions.

It is recommended that funds be immediately allocated to pay for adequate equipment and a computer analyst to develop a database. Currently this office is working with computers that are obsolete. The computers that are in the office are slow, outdated, and cannot hold much information, even though the computers' memories were recently increased.

In order for the database to serve our needs, this office requires two Power PC's that can help us maintain, retrieve and input all the data that is being compiled. Furthermore, a new printer would also be needed to publish and produce the data. The services of a data entry person are also needed to capture and enter information in the backlog of cases. The Office of the

Independent Police Auditor staff can handle the daily flow of information.

With the assistance of several volunteers, the Office of the Independent Police Auditor published a brochure in three languages, English, Spanish and Vietnamese, explaining the functions of its office. Special gratitude and recognition are extended to Mrs. Maria Rodriguez, a Migrant Education teacher at Chaboya Middle School who provided her services and the services of her aides, Mrs. Lucia Velez and Mr. Tan Nguyen, to assist in the translation of this brochure.

This brochure will greatly assist the Auditor in reaching out to the community. Surveys conducted by this office as parts of the process of auditing complaints revealed that the majority of the complainants were not aware of this office before they were contacted.

It is recommended that three thousand dollars be allocated for the printing of 10,000 brochures for immediate distribution.

D. AMENDMENTS AND FINALIZATION OF THE POLICIES AND PROCEDURES FOR THE OFFICE OF THE INDEPENDENT POLICE AUDITOR

The policies and procedures by which this office will operate need to be amended to reflect the nine months of on the job experience. Some of these procedures have proven to be inadequate in the day to day operations. The draft of these procedures has offered some guidance in helping resolve some issues but fail to address others. Waiting until this office was in existence for some time in order to test the procedure has been beneficial. However, other issues that were unforeseen at the time the procedures were drafted need to be addressed.

During the past nine months, several issues have arisen for which there is no definitive answer in the procedures. For instance, the jurisdiction of this office has not been clearly defined. The following jurisdictional questions have been raised and need to be resolved in the

final draft:

1. Does the Office of the Independent Police Auditor have jurisdiction to fully audit Department Initiated Complaints? These are complaints against police officers initiated by the Office of the Chief. Situations may arise where a nexus is found between Citizen and Department Initiated Complaints.
2. Does the Office of the Independent Police Auditor have jurisdiction to audit complaints from ex-police officers if the conduct complained about occurred while they were still police department employees? Citizens have contacted the Auditor's office requesting that their complaints be reviewed because they were dissatisfied with the handling of their complaint.
3. Another problem that has surfaced and needs to be resolved promptly is the issue concerning the confidentiality of files. There is certain information that has been deemed confidential by Internal Affairs, and thus is not provided to the Office of the Independent Police Auditor. This issue is currently being reviewed by the City Attorney. The type of information withheld involves criminal history information, police reports involving sexual assault victims and police reports involving minors. There are several complaints from parents of minors filed in this office which have been placed on hold until it is determined if the Auditor can have access to the police report information. The information contained in the police report is crucial when determining if an unlawful arrest, search or other such conduct occurred.

VIII. CONCLUSION

The Office of the Independent Police Auditor has made significant inroads in promoting the services of this office to the citizens of San Jose. During the third quarter, the Auditor met with representatives of the following organizations:

1. Paul Periera of the San Jose Youth Commission
2. Rob Elder, Editor of the San Jose Mercury News
3. Maria Rodriguez, teacher at Chaboya Middle School
4. Officer Jim Tomaino, President, San Jose POA
5. The San Jose Human Rights Commission

To remain current with the training, policies and procedures of the San Jose Police Department the Auditor monitored several of the Police Academy classes. The following is a list of classes and/or functions attended:

1. Classes on Community Policing
2. Classes on Cultural Diversity
3. Assisted with Inspection of the Recruits at the San Jose Police Academy

Other activities that the Independent Police Auditor attended or participated in were the following:

1. San Jose Management Conference
2. Oral Board for the Santa Clara Public Defenders Office
3. Internal Affairs Training by Labor Attorney Larry F. Estrada

The total number of cases filed and audited has maintained steady. The Office of the Independent Police Auditor is continuously making adjustments, changes and implementing new methods in its day to day operations. Internal Affairs and this office work together on problems as they arise and achieve mutually acceptable resolutions. Frequent communication and open

disclosure from Internal Affairs to the Office of the Independent Police Auditor are critical in maintaining the integrity of the auditing system.

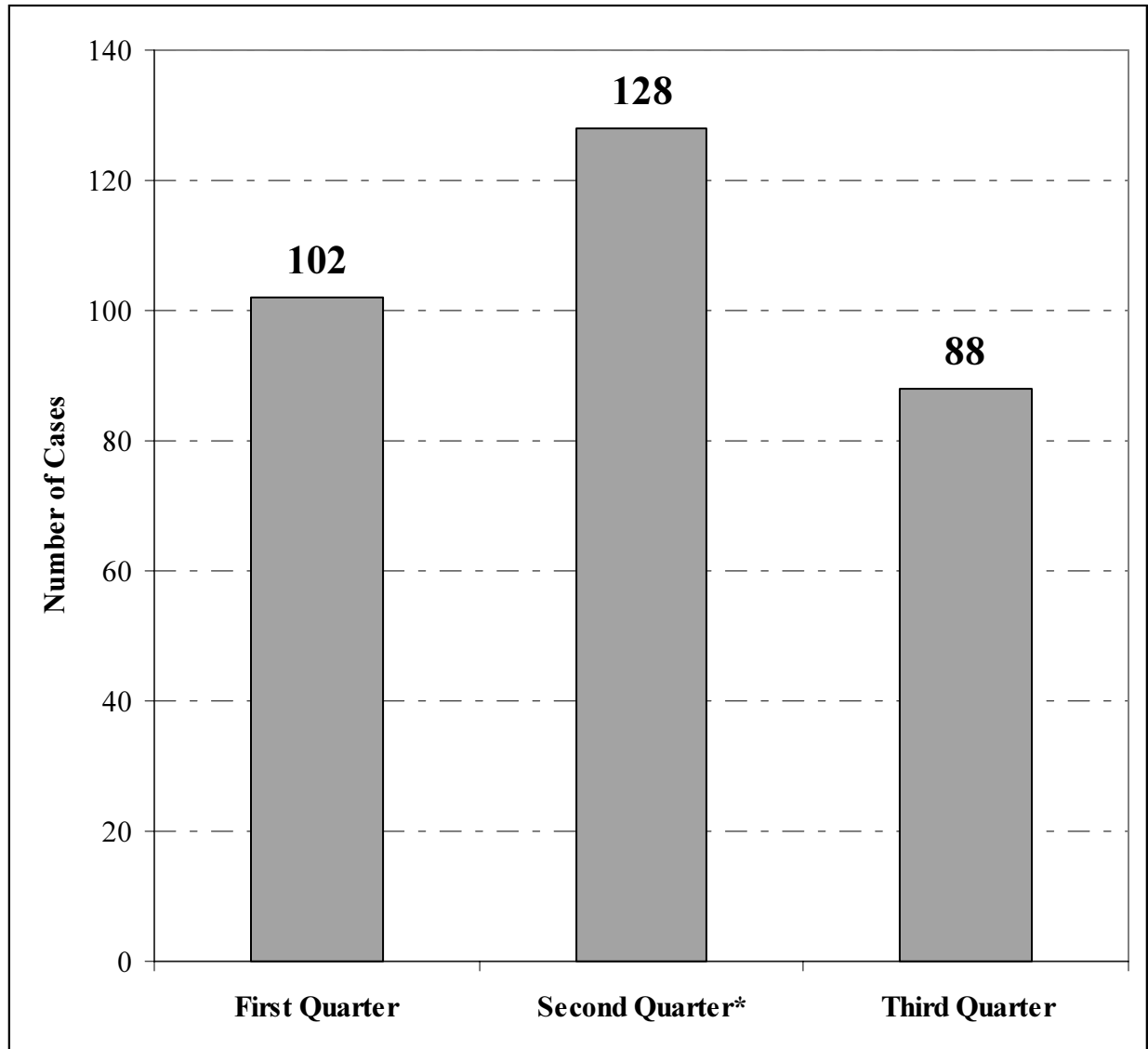
The low level of sustained rate for citizen initiated complaints continues to be a concern. The majority of cases end up in a gray zone with the police, the complainant and complainant's witnesses at opposite ends. It is the intent, that such recommendations as the implementation of an Onlookers Policy, additional documentation for purported Attitude arrests, quicker investigation and resolution of the complaints that will hopefully provide additional information in which cases can be clearly decided on. A study of the sustained cases did not reveal any common elements among them primarily because it is such a small sample (5).

In compliance with the city ordinance mandate that this office performs community outreach, a mass mailing of our newly created brochure will be made. This will be an effective tool in reaching a greater portion of the San Jose residents. This brochure is informational and will facilitate the filing of a complaint. We have already established some distribution centers to assist in this matter. In addition, the Independent Police Auditor will continue to accept invitations to speak at community groups.

The next quarter report will consist of an accumulation of one year of statistics, an evaluation of the Auditor's recommendations, a self-assessment, a projection of the goals this office will seek to accomplish in the following year and a list of the trends that this office will track.

APPENDIX 1

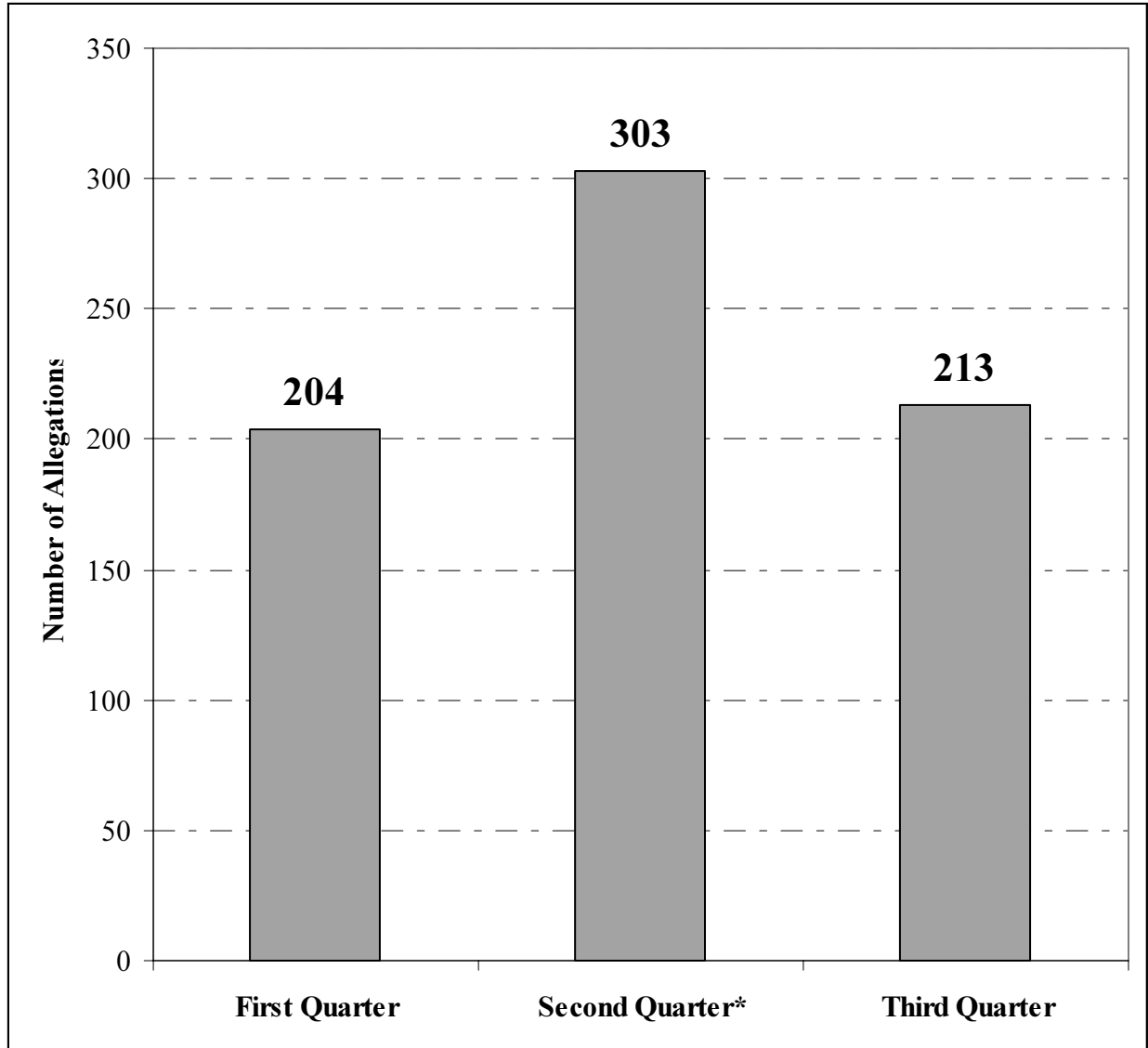
TOTAL FORMAL MISCONDUCT CASES



* The Second Quarter contains three and a half months of statistics.

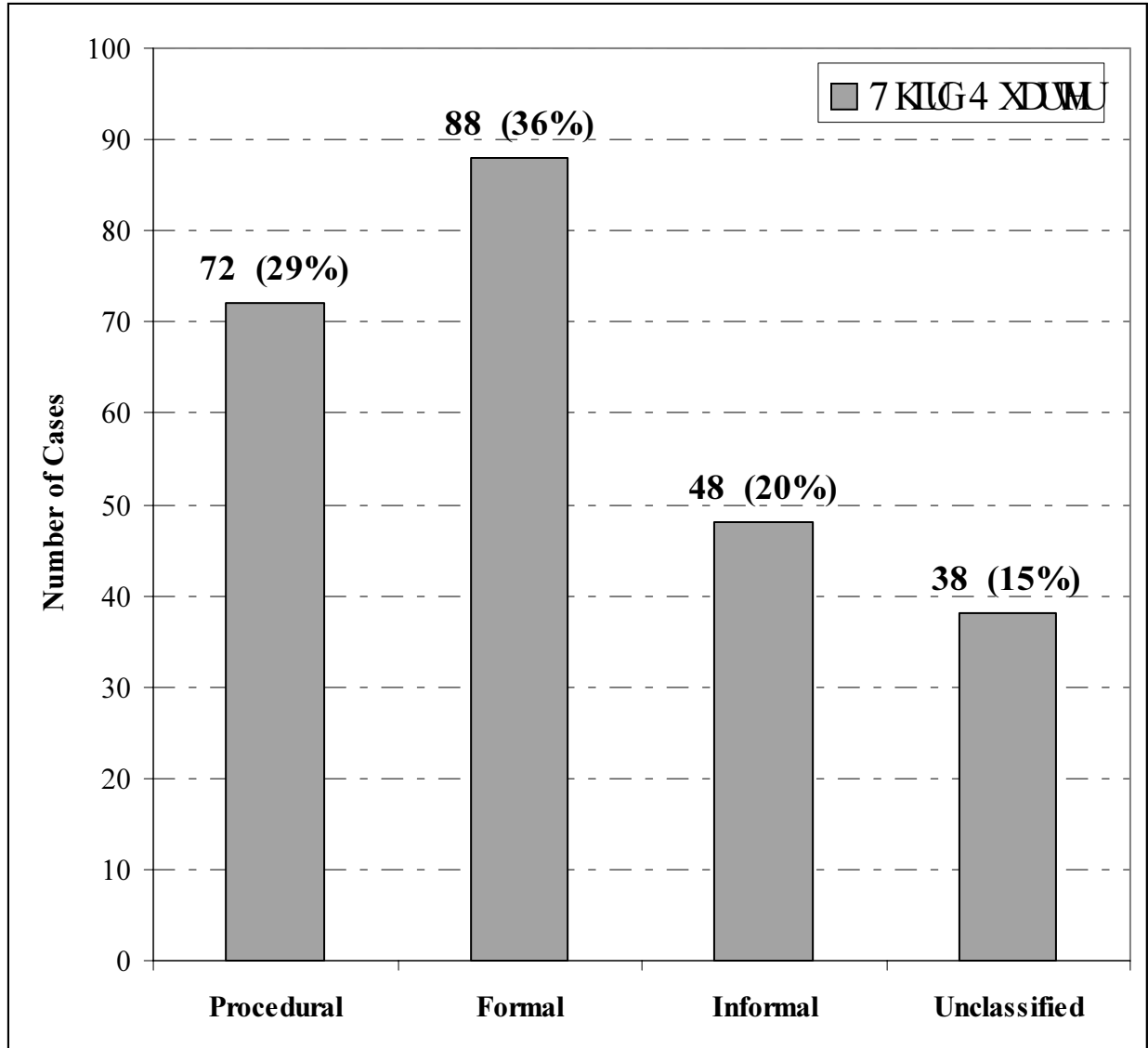
APPENDIX 1

TOTAL FORMAL MISCONDUCT ALLEGATIONS



* The Second Quarter contains three and a half months of statistics.

APPENDIX 2

TOTAL CASES AUDITED : 246

APPENDIX 3

MISCONDUCT ALLEGATIONS

For Formal Misconduct Complaints each investigation will involve one or more of the following general allegations:

1. Unlawful Arrest
2. Unlawful Search
3. Unnecessary Force
4. Rude Conduct (abusive, threatening, profanity, poor attitude, etc., while on duty.)
5. Discrimination (sexual, racial, etc.)
6. Excessive Police Service (harassment, providing confidential information, etc.)
7. Improper Procedure (violation of City policy, duty manual)
8. Delay in Response / Slow Response
9. Failure to Take Action
10. Unofficerlike Conduct (off-duty behavior, violation of the law, drug / alcohol use, misuse of City property, gratuities, bribes, abuse of authority, etc.)
11. Missing / Damaged Property

APPENDIX 4

DEFINITIONS OF FINDINGS

1. **SUSTAINED:** The investigation disclosed sufficient evidence to clearly prove the allegation made in the complaint.
2. **NOT SUSTAINED:** The investigation failed to disclose sufficient evidence to clearly prove the allegation made in the complaint or to conclusively disprove the allegation.
3. **EXONERATED:** The acts, which provided the basis for the complaint or allegation, occurred; however, the investigation revealed that they were justified, lawful and proper.
4. **UNFOUNDED:** The investigation conclusively proved that the act or acts complained of did not occur. This finding also applies when the individual member(s) or employee(s) named were not involved in the act or acts, which may have occurred.
5. **NO FINDING:** The complainant failed to disclose promised information to further the investigation; or the investigation revealed that another agency was involved and the complaint or complainant has been referred to that agency; or the complainant wishes to withdraw the complaint; or the complainant is no longer available for clarification.

APPENDIX 5

SAN JOSE POLICE DEPARTMENT

Rights of Onlookers at the Scene of an Incident

Onlookers shall be permitted to observe and overhear conversations in detention or arrest situations in public areas when it is reasonable to do so. Onlookers may remain in the vicinity as long as the presence of these persons does not interfere with the officers duties or create a safety concern for the officer, person detained, or onlooker.

Onlookers must maintain a reasonable distance when monitoring police activities depending on the circumstances. Onlookers are allowed to approach within hearing distance provided that the control of the situation can be maintained by the officer. Onlookers who are clearly at a reasonable distance will not be subject to a “move-on” order or threatened with arrest.

Nothing in this order is meant to restrict an officer from arresting any person who willfully resists, delays, or obstructs any peace officer in discharging his or her duties according to the provisions of Penal Code Section 148. Nor does this order restrict an officer from arresting any person who willfully commits a trespass as defined in Penal Code Section 602.

Officers need not justify their compliance or non-compliance with this order to onlookers at the scene of an incident. If an onlooker creates a disturbance, a supervisor will be called to the scene to resolve and document this incident.

APPENDIX 5

San Francisco Police Department
GENERAL ORDER

DGO 5.07
MAY 17 1994
xx/xx/xx

RIGHTS OF ONLOOKERS (D-3)

This order established policies regarding when persons are permitted to remain as onlookers, their right to overhear conversations between the officer and suspect, and their right to act as a witness.

I. POLICY

A. WITNESSING STOPS, DETENSIONS, ARRESTS

It is the policy of this Department that persons not involved in an incident be allowed to remain in the immediate vicinity to witness stops, detentions and arrests of suspects occurring in public areas, except under the following circumstances:

1. When the safety of the officer or the suspect is jeopardized.
2. When persons interfere or violate law.
3. When persons threaten by words or action, or attempt to incite others to violate the law.

B. OVERHEARING CONVERSATION

If the conditions at the scene are peaceful and sufficiently quiet, and the officer has stabilized the situation, persons shall be allowed to approach close enough to overhear the conversation between the suspect and the officer, except when:

1. The suspect objects to persons overhearing the conversation.
2. There is a specific and articulate able need for confidential conversation for the purpose of police interrogation.

C. INQUIRIES

1. Persons shall be permitted to make a short, direct inquiry as to the suspect's name and whether the officer or the suspect wishes a witness. The suspect shall be allowed to respond to the inquiry.
2. If a citizen is a witness to the activity for which the suspect was detained

APPENDIX 5

DGO 5.07
MAY 17 1994
xx/xx/xx

or arrested, the officer may request his or her name; however, the citizen is not compelled to disclose such information.

C. VIOLATIONS

As an alternative to arresting an onlooker who is in violation of Penal Code Section 148 or other related offenses (e.g. 647 c P.C., 22 Municipal Police Code), officers may order onlookers to “move on,” however, the person shall not be ordered to move any further distance than is necessary to end a violation (see DGO 6.11, Obstruction of Streets and Sidewalks).

D. COMPLIANCE

Persons who believe that an officer did not comply with the provisions of this order shall be referred to the Office of Citizen Complaints (OCC). They may file a citizen complaint at that time (see DGO 2.04, Citizen Complaints Against Officers).

References

DGO 2.04, Citizen Complaints Against Officers
DGO, 5.03, Investigative Detentions
DGO 6.11, Obstruction of Streets and Sidewalks

APPENDIX 6

In the City of San Francisco the following guidelines were implemented for persons believed to be Drunk in Public:

- A. Persons arrested and charged with violating 647(f) of the Penal Code who subsequent to their detention are adjudged sober by the station keeper, shall be released.
- B. Furthermore, a person arrested for 647(f) may not be denied the opportunity to obtain a blood, breath, or urine test for the presence of alcohol. The Police Department is not responsible for informing anyone that a test may be requested but, if requested, the opportunity to have the test performed must be given.
- C. If a person arrested for 647(f) requests to have a blood, breath or urine test to determine the percentage of alcohol in his/her body, then the following shall take place:
 - 1. The requesting person shall be informed that the costs of testing shall be at his/her personal expense.
 - 2. A "Request for Alcohol Test" form shall be prepared by the Station Keeper (Booking Officer).
 - 3. The requesting person shall be allowed to make telephone arrangements to have a tester respond to the station to administer the test.
 - a. If the tester does not arrive before normal transfer of prisoners or time of release then the transfer or release shall be effected.
 - 4. The "Request for Alcohol Test" form shall contain:
 - a. Time of the request
 - b. Telephone number called
 - c. Tester contacted
 - d. Time of the response by the tester
 - e. Time the test is administered
 - 5. Logs of requests shall be maintained at the District Station.